UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

MTIL, INC

and

13-CA-189867

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,LOCAL 1103

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTION TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Melissa M. Olivero [1] correctly held that Respondent MTIL, Inc., violated Section 8(a)(1) of the Act by engaging in 7 independent violations which included multiple instances of the following: 1) threatening employees with discharge and plant relocation; 2) promising and granting benefits; 3) requesting employees solicit others to vote "no" in a union election; and 5) interrogating employees. (ALJD 22-27) Additionally, the ALJ found that Respondent violated Section 8(a)(3) of the Act by discharging employee Bobby Frierson on December 14, 2017. (ALJD 30) Based upon the coercive nature of these unfair labor practices which traditional remedies cannot erase, under *NLRB v. Gissel Packing Co., 395 U.S. 575 (1969),* the ALJ properly granted the extraordinary remedy of ordering Respondent to bargain in good faith with

[1] Throughout this Answering Brief, the Administrative Law Judge will be referred to as "ALJ," the National Labor Relations Board will be referred to as the "Board," and the National Labor Relations Act will be referred to as the "Act." With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr.", followed by the page number. General Counsel's exhibits will be designated "G.C.", Charging Party's exhibits will be designated "C.P.", and Respondent's exhibits will be designated "Res.", each designation followed by its respective exhibit number. The Administrative Law Judge's Decision will be referred to as "ALJD __." United, Electrical, Radio and Machine Workers of America, Local 1103 will be referred to as "the Union" or "UE" and MTIL, Inc., will be referred to as "Respondent" or "MTIL".

the Union over the terms and conditions of employment of its production and maintenance employees. (ALJD 33)

Respondent has filed an exception to the factual findings and credibility determinations of the ALJ.[2] Contrary to Respondent's contentions, the ALJ's decision explains in exacting detail the facts and reasoning supporting her decision that the Respondent violated the Act. Nothing contained within the Respondent's exception detracts from the ALJ's findings of fact, credibility resolutions, and conclusions of law, which appropriately rely upon the evidence contained in the record and are amply supported by legal precedent and should be upheld.

The Respondent has failed in its exception to show that any of the ALJ's findings are incorrect and necessitate overturning the ALJD. Accordingly, Counsel for the General Counsel posits that the only conclusion to be reached is that the Board should adopt Judge Olivero's Decision and Order in its entirety.

I. The Record Clearly Supports the ALJ's Findings with Regard to the Credibility Determinations.

Respondent makes specious arguments in its Exception that appear to be an effort to challenge the ALJ's credibility determinations. However, under the well-established precedent set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), the Board does "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." The Board, rightly so, places great weight on

[2] The Respondent did not raise any exceptions to the ALJ's findings that Respondent violated Section 8(a)(1) of the Act or the ALJ's determination that a *Gissel* bargaining order was warranted. Respondent's only exception appears to be the ALJ's finding that Bobby Frierson was terminated for engaging in union activity in violation of Section 8(a)(3) of the Act.

administrative law judges' credibility findings since the trial examiner observes the witnesses testify first hand. The Board does not overrule credibility determinations except where the clear preponderance of *all* the relevant evidence convinces the Board that the administrative law judge's resolutions were incorrect. (Id.)

Although Respondent is dissatisfied with many of the ALJ's credibility determinations, Respondent has failed to support such dissatisfaction with actual evidence of bias or any other recognized basis for establishing that the ALJ's credibility determinations run contrary to the "clear preponderance of all the relevant evidence." Likewise, the ALJ's credibility determinations discrediting Respondent's witnesses are supported by Respondent's shifting defense and the shifting testimony of its witnesses on critical evidence. Accordingly, because Respondent has clearly not met its burden all credibility determinations of the ALJ should be sustained.

II. The Record Fully Supports the ALJ's Findings that Bobby Frierson was Discharged for Union Activity.

Respondent does not dispute that from October 2016 until the end of his employment Frierson was the main organizer in the Union's campaign to represent a unit of Respondent's production and maintenance employees. (ALJD 28) It is also undisputed that Frierson was the primary contact between the Union and employees at Respondent's facility, collected approximately 31 employee authorization cards on behalf of the Union, attended union meetings, returned the cards to the Union after they were collected, appeared on/distributed two campaign flyers, and was an open and notorious supporter of the Union. (Id.) Respondent's supervisor Cornelius Chandler admitted that in early December 2016, he personally became aware of Frierson's union activities. (Tr. 521; ALJD 28) In its Exception, Respondent concedes that Frierson engaged in union

activity and Respondent had knowledge of that activity. (Respondent's Exception pg. 4) However, Respondent denies that there is any nexus between Frierson's termination and his union involvement. (Id.) Contrary to Respondent's claims, the ALJ did not err in finding that Frierson was suspended and subsequently terminated because of Respondent's animus towards his union activity. (ALJD 30)

The ALJ appropriately found that Respondent's animus towards the Union, and towards Frierson's union activities, was demonstrated by its ongoing and continuously hostile conduct towards the union campaign and the timing of Frierson's discharge. (ALJD 28) Specifically, the ALJ found that Respondent's opposition towards the possibility that its employees would support the Union repeatedly exhibited itself in the form of numerous threats made by its highest ranking official, Ramone Haya, and Chandler. The ALJ found that both managers violated the Act in the following manner: Haya and Chandler interrogated employees and threatened that if the Union won the election union supporters would be fired; Haya repeatedly threatened employees with plant closure and relocation if the Union won the election; Haya attempted to bribe and coerce employees to assist with the anti-union campaign; Haya granted employee bonuses and holiday pay in order to discourage them from engaging in union activity; and Haya threatened employees with random drug testing if the Union won the election. (R. 12, 15; Tr. 36, 38, 152, 154, 162, 312, 324, 326, 336, 346-347, 623; ALJD 21-27)

The ALJ noted that the specific instances of animus towards Frierson were shown through the multiple 8(a)(1) statements that were made directly to him by Respondent's managers which included an attempt to unlawfully entice him with the promise of and granting of benefits, and interrogating him about his union activity. (ALJD 28)

The ALJ also accurately held that the timing of the Respondent's threats and grant of benefits—many of them occurring almost immediately after a majority of employees selected the Union as their bargaining representative and the remainder immediately following the summary discharge of the lead organizer—clearly established that Respondent was motivated by its extreme animus towards the production and maintenance employees' attempts to organize.[3] (ALJD 28) Accordingly, the ALJ properly held that Frierson's termination, within two weeks of Respondent learning of his union activity, coupled with traditional factors such as additional 8(a)(1) threats clearly established that Frierson was terminated for engaging in union activity. (ALJD 28-29)

Based upon this clear and convincing evidence the ALJ found that Counsel for the General Counsel established its *prima facie* case showing that Respondent's anti-union sentiment towards its employees organizing efforts was a substantial or motivating factor in discharging Frierson on December 14, 2017. (ALJD 29) Upon this determination, the burden of proof then shifted to Respondent to show that it would have taken the same action even in the absence of Frierson's protected conduct. *Wright Line*, 251 NLRB 1083 (1980). Within the framework of the *Wright Line* analysis, if the reasons advanced by the employer for discharging employees are deemed to be pretextual, the Respondent's defense of justification is deemed "wholly without merit." *Wright Line* supra, at fn. 5; *Limestone Apparel Corp.*, 255 NLRB 722 (1981).[4] As the record and Judge Olivero's

[3] Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 40 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect).

[4] Further, a finding that the employer's justification was pretextual supports an inference that the employer was motivated by anti-union animus in taking action against its employees; thereby augmenting the GC's prima facie case that protected concerted activity was a motivating factor in decision to discharge. See e.g.

well-reasoned analysis in her ALJD clearly demonstrate, Respondent's proffered pretextual reason for terminating Frierson because of insubordination and threats of violence failed to meet Respondent's burden. (ALJD 29)

The events that lead to Frierson's termination began on December 13, 2017. (Tr. 164) On that day, Frierson received a verbal warning from Chandler for talking with his coworkers. (Tr. 164-165; ALJD 10) Later that same day, Frierson visited the office area to request a copy of his verbal warning from Chandler. (Tr. 167-168; ALJD 10) As for what occurred after Frierson arrived at the office, the ALJ properly credited the testimony of Frierson and Respondent's Human Resource Administrator Lionel Hudson: that Chandler informed Frierson that he was not being written up and he needed to leave the facility, and Frierson promptly complied with his supervisor's directive.[5] (Tr. 168, 426; ALJD 10

After Frierson left the office area, for some inexplicable reason, employee Gerald Bradley followed him into the parking lot of Respondent's facility. (Tr. 575; ALJD 10) As to what occurred when Bradley arrived in the lot, the ALJ found that Frierson and Sean Fulkerson, lead organizer for the Union, fully corroborated each other as to what transpired and credited their testimony. (ALJD 10) Frierson and Fulkerson testified that Bradley arrived in the lot with two other second shift employees and asked Frierson if he wanted to fight. (Tr. 172; ALJD 10) Fulkerson immediately intervened to quell the argument and there was no physical contact during the incident. (Tr. 173; ALJD 10)

Whitesville Mill Service Co., 307 NLRB 937 (1992); *C-F Air Freight, Inc.*, 247 NLRB 403, 409 (1980) (finding that an employer's justification is pretextual can augment the General Counsel's prima facie case that protected activity was a motivating factor in the decision to discipline.)

[5] The ALJ made the appropriate finding that Chandler's testimony that Frierson threatened him in the office was not credible, since it was contradicted by Respondent's own witness, Lionel Hudson. (ALJD 10, 30) Inasmuch as the ALJ's credibility determinations do not contravene the clear preponderance of all relevant evidence they may not properly be overruled. *Standard Dry Wall Products*, 91 NLRB 544 (1950).

The ALJ correctly found that Bradley's version of events that occurred in the parking lot on December 13, 2016, defied logic. (ALJD 19) According to Bradley, although Frierson was in an uproar, he felt compelled to hunt him down while on the clock to initiate an investigation into Frierson's comments towards his nephew. (Tr. 575, 576, 578; ALJD 19) The ALJ held that Bradley incredulously testified that he was not being misleading when he reported to his employer that he was working when he spoke with Frierson, because as a lead forklift driver his job assignment is "everything in the factory and parking lot." (Tr. 582; ALJD 10) The ALJ found that Bradley's version of events was fatally inconsistent and the ALJ correctly refused to credit his fanciful and uncorroborated testimony. (ALJD 10)

The following day, December 14, 2016, Frierson met with Hudson and was informed that he was suspended pending an investigation. (Tr. 175; ALJD 11) Hudson provided Frierson with a suspension notice at the meeting, which stated he was suspended because he "[w]as insubordinate when he was told to stop talking with associates and return to his work area [and] approached his supervisor in a threatening manner and also threatened other co-workers verbally." (G.C. 71, Tr. 175, 458-459; ALJD 11) [6]

Later that evening, Frierson was terminated. (Tr. 180, 449, ALJD 12) According to Respondent, Frierson was terminated for "insubordination and [a] threat of violence." (Tr. 444; ALJD 29) Hudson testified that Frierson was insubordinate on the shop floor and for threatening Bradley. (Tr. 444-445; ALJD 29) However, as prudently observed by

[6] In footnote 31of the ALJD, the ALJ made an inadvertent error and referred to "Chandler" rather than "Frierson". Counsel for the General Counsel notes that footnote 31 should correctly read as follows: "Also, as explained more fully below, I have found that Respondent treated Frierson disparately and that its explanation of his discharge is a pretext."

the ALJ, Respondent shifted its reasons for discharging Frierson to allege that he was insubordinate when he failed to promptly exit the facility on December 13, 2017, and for making a verbal threat to Chandler. (Tr. 436; ALJD 29) The ALJ held that Respondent's shifting explanations for Frierson's termination support a finding that the reasons offered by the Respondent are pretextual and evidence of an unlawful motive.[7] (ALJD 29)

Finally, the ALJ properly concluded that there was extreme evidence of disparate treatment in Frierson being discharged for allegedly making a verbal threat to a coworker. (ALJD 30) Specifically, employees Bendezu, Wilmot, and Collins observed employees engaged in physical fights and the offending parties returned to work. (Tr. 313, 329, 349-350; ALJD 30) The ALJ appropriately found that the most glaring demonstration of disparate treatment consisted of documentation and testimony that employee Labrie Ousley physically attacked his pregnant girlfriend inside Respondent's facility. (G.C. 69; Tr. 52-53, 184; ALJD 30) Despite written and corroborated testimony that he brutally attacked his pregnant girlfriend, Ousley was not terminated and only received a three day suspension. (Tr. 450; GC Ex. 29; ALJD 30) *Weldon, Williams, & Lick, Inc.*, 348 NLRB 822, 826 (2006) (pretext finding required where employer's claim that employee was violent, damaged property, and threatened to wear gun holster was false); *Rood Trucking Co.*, 342 NLRB 895, 897-900 (2004) (pretext finding mandates conclusion that Respondent would not have discharged employee despite protected conduct). (G.C. 69; Tr. 51-53,184) The ALJ noted that Chandler's self-serving testimony that a mere threat,

[7] See *Lucky Cab Co*., 360 NLRB 271, 274 (2014) (shifting reasons for an employer's adverse actions are not only persuasive evidence of discriminatory motive, but also serve as evidence of pretext); *Approved Electric Corp*., 356 NLRB 238 (2010)(citing *City Stationery, Inc*., 340 NLRB 523, 524 (2003*); GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

because it was directed at a supervisor, is more serious than an actual assault defied credulity. (Tr. 530; ALJD 18, 30) In its Exception, Respondent was unable to present any case law to support its dubious position that a purported threat to a manager allowed an employer to disparately administer discipline. The disparity in treatment of Frierson, who purportedly made an unconfirmed threat and was fired, and Ousley, who committed an actual assault and was merely suspended for three days, provided convincing evidence that Respondent did to Frierson exactly what management threatened Respondent would do if the employees organized—create a pretext to rid itself of Union supporters. (ALJD 30)

Therefore, with respect to the discharge of Frierson, Respondent completely failed to establish that it would have terminated Frierson even absent his union activities. *Whitesville Mill Service Co.*, 307 NLRB 937 (1992); *C-F Air Freight, Inc.*, 247 NLRB 403, 409 (1980) (finding that an employer's justification is pretextual can augment the General Counsel's prima facie case that protected activity was a motivating factor in the decision to discipline.) As such, the ALJ reached the only logically supported conclusion: that Respondent's discharge of Frierson violated Section 8(a) (3) of the Act. Therefore Respondent's Exception must be dismissed.

CONCLUSION

Based upon the foregoing, the entire record in this case, and the Decision of Administrative Law Judge Olivero, Counsel for the General Counsel submits that Respondent's Exception to the Administrative Law Judge's Decision is wholly without merit. Counsel for the General Counsel respectfully requests therefore, that

Respondent's Exception be dismissed in its entirety and Judge Olivero's recommended Decision, Order and Remedy by affirmed.

Respectfully submitted,

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DATED in Chicago, Illinois, this 26th day of September, 2018.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE GENERAL COUNSEL'S Answering Brief** was electronically filed with the Division of Judges of the National Labor Relations Board on **September 26, 2018**, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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